Eligibility FAQs

Frequently Asked Questions

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This section is a method by which to provide uniform responses to questions that have been raised during the course of implementation of the Eligibility Criteria and Procedures, and to ensure that these responses are disseminated widely.

1. Will ILS be providing eligibility-determination forms in Spanish?

Yes. A Spanish translation of the Eligibility Criteria and Procedures Blackletter, the Assigned Counsel Eligibility Application Form, the Sample Notice of Eligibility Recommendation, the Sample Notice of Applicant's Right to Seek Review and the Sample Notice of Judge's Ineligibility Decision are forthcoming and will be posted on ILS' website once completed.

2. Do the Eligibility Criteria and Procedures apply to Family Court proceedings?

No. Pursuant to the Hurrell-Harring Settlement, ILS created the Criteria and Procedures to guide courts in the counties outside New York City in making eligibility determinations in criminal cases. However, as ILS Director, Bill Leahy, stated in his April 4, 2016 E-Mail transmittal accompanying the issuance of the Criteria and Procedures, "we hope that [the Criteria and Procedures] will provide guidance also to judges making eligibility determinations in criminal cases in New York City, and to Family Court judges statewide."

ILS intends to develop eligibility criteria and procedures for Family Court that will build upon these Criteria and Procedures, while taking into account the unique circumstances of Family Court practice. We do not yet have a timeframe for doing so. Once such Criteria and Procedures are developed, we will provide training for mandated providers and work with OCA on the training of Family Court judges and other appropriate personnel.

3. Is the word "dependent" defined in the Criteria and Procedures? Should we be using the tax law definition?

"Dependent" is not specifically defined in the Eligibility Criteria and Procedures. In using this term, ILS seeks to include any person for whom the applicant is providing financial support on an ongoing basis, even if the caretaking arrangement is informal. We intentionally do not use a formal definition because we recognize that many caretaking arrangements are not formalized, yet are still quite significant in terms of the caretaker's financial responsibilities.

4. Does receipt of Social Security Disability or Social Security survivors' benefits render an applicant presumptively eligible?

No. Unlike Supplemental Security Income (SSI), Social Security Disability (SSD) and Social Security survivors' benefits are not need-based programs. Instead, these programs are based on the work history of the recipient (or the recipient's parent or spouse). Of course, often the monthly payments for these benefits are quite low, so it may be that, while an applicant is not presumptively eligible based on receipt of SSD or Social Security survivor's benefits, an applicant might be otherwise presumptively eligible because his or her income is below 250% of the Federal Poverty Guidelines (FPG).

5. Should a defendant who depends on service-related military disability income be deemed presumptively eligible for assignment of counsel? If not, should the service-related disability payments count as income for purposes of determining eligibility for assignment of counsel?

The answer to this question turns on whether the income is Veteran Disability Pension or Veteran Disability Compensation. Like SSI, Veteran Disability Pension is a need-based benefit paid to wartime Veterans over 65 years old and with permanent and total non-service connected disability. Defendants who depend upon Veteran Disability Pension payments are presumptively eligible for assignment of counsel, and these payments should not be counted as income for assigned counsel eligibility purposes. Veteran Disability Compensation is not need-based, but is based on a disability rating which the VA assigns based on evidence of a relationship between the veteran's current disability and his in- service injury (see http://www.benefits.va.gov/BENEFITS/factsheets/limitedincome/livepensio… and http://www.benefits.va.gov/COMPENSATION/types-disability.asp). As such, Veteran

Disability Compensation should be treated the same as SSD in the financial eligibility assessment, and be counted as income. Of course, if the monthly payments of these benefits are quite low, it may be that, while the veteran is not presumptively eligible based on his receipt of the Veteran Disability Compensation, he might otherwise be presumptively eligible because his income is below 250% of the Federal Poverty Guidelines (FPG).

6. Can Question 3 of the Sample Application be expanded to include Family Court, so that the question posed asks whether the applicant has been deemed eligible in a Family Court matter, as well as in other criminal matters?

The Eligibility Criteria and Procedures do not require that a person who has recently been deemed eligible for assigned counsel in a Family Court matter be presumed eligible for counsel in a criminal case. However, while not required, it would not be contrary to the Eligibility Criteria and Procedures to do so.

7. Can the application be expanded to include other information, such as a defendant's citizenship status or Social Security Number?

Yes. The sample application includes only information pertinent to assigned counsel eligibility. However, providers may use the application to collect additional information pertinent to the representation of the defendant so long as doing so does not delay the application process.

8. Criterion VIII factors the "actual cost of retaining a private attorney in the relevant jurisdiction" for the category of crime charged. Does ILS have plans to assist mandated providers in discerning the average cost of counsel in each jurisdiction?

ILS is currently developing an instrument that entities involved in eligibility screening may use as a tool to determine the cost of private representation for different types of cases in their jurisdictions. The instrument is a brief survey that asks for attorney costs as well as, where relevant, expenses for experts, investigators, and other professional services. Once the survey instrument is completed, ILS will make it available to entities involved in eligibility screening, who can then administer the survey online, via email, mail, or telephone.

9. It is understood that spousal income should not be imputed to the applicant. But, when the spouse works, should the spouse be included in determining the family size? Or should the spouse be excluded from the family size count because his income is not being imputed to the applicant in assessing eligibility? In other words, while a spouse's income is not imputed to the applicant, should the spouse still count in the household size?

For purposes of determining an applicant's income level for assigned counsel eligibility, household size is calculated by including the applicant and all persons for whom the applicant bears financial responsibility. This includes a spouse who lives in the household and does not have a source of income. However, if the spouse has income greater than $10,400, the spouse should not be counted as a member of the household for household size. As reflected on the "Income Eligibility Presumption: Federal Poverty Guidelines Chart," $10,400 is the approximate amount by which each additional dependent increases the annual
income a family needs to be at 250% of the Federal Poverty Guidelines. Counting as a dependent a spouse whose income is more than $10,400 would result in an artificially high income threshold for purposes of the Eligibility Criteria and Procedures' income presumption eligibility.

10. Regarding the ability to implement the Eligibility Criteria and Procedures:

i) How will providers be trained?
ii) When, during the course of implementation, questions about application of the Criteria and Procedures arise, what is the process for ensuring that answers to these questions are disseminated to everyone so there is uniformity in the application of the Criteria and Procedures?

ILS is implementing a twofold approach to training: (1) in-person communication with providers; and (2) ongoing updates to our website.

Regarding communication, ILS recognizes the importance of training the staff of all mandated providers across the state. Full, comprehensive training is possible when each provider designates one or two staff persons (legal and non-legal) to serve as a Point Person. The Point People will:

(a) Be trained by ILS, and, using the materials and tools that ILS has developed, will, in turn, train those persons in their offices who are involved in the eligibility assessment process.
(b) Be a conduit for on-going communication between the other staff members and ILS – i.e., a person to relay implementation questions to ILS, and to receive from ILS answers to implementation questions that other providers have asked.
(c) Be a conduit for communication with ILS about data collection and maintenance.

To ensure widespread dissemination of responses to questions asked during implementation, ILS has created this FAQ section on its website, which will provide ongoing updates.

11. For those providers who struggle financially to staff their offices with one or two persons to perform the screening functions, will ILS consider dedicating some of the distribution or Upstate caseload relief monies to hiring staff to perform screening functions in those offices?

Counties may submit a proposal to use distribution funding to add staff to perform the screening function. As with any proposal that is submitted, it is subject to ILS' approval.

12. Is ILS working closely with the Case Management System (CMS) to collect and maintain data?

ILS has been working closely with NYSDA to update CMS, and we will be working with providers who use other case management systems as well. We will be having ongoing conversations with providers about data collection, and with NYSDA and providers that use other case management systems about data maintenance.

13. Will ILS consider automating the eligibility application process by using a mobile device, such as an I-Pad or an I-Phone application, in order to make it easier for individuals to apply for assigned counsel?

ILS will look into that possibility, but doing so may be complicated by the difficulty of developing a system that is compatible with CMS and the other case management systems providers use.

14. Regarding the 2010 Self Sufficiency Standard (SSS), what income does someone need to make in order to be deemed self-sufficient?

The Self-Sufficiency Standard for New York State 2010 sets forth, county by county, what individuals and families need to earn to meet life's basic necessities without having to rely on public assistance or private help (e.g., relying on a relative for free child care or receiving food from a food bank). In arriving at this standard, the report considers the local costs of housing, child care, food, transportation, health care, miscellaneous items, and taxes/tax credits as well as the number of people in the family and their respective ages. A person who is considered self-sufficient under this standard does not have savings, has no disposable income, lives paycheck to paycheck, and does not have extra money for recreation or entertainment – in other words, a self-sufficient person or family can simply make ends meet. The Self-Sufficiency Standard for New York State 2010 can be found at: http://www.fiscalpolicy.org/SelfSufficiencyStandardForNewYorkState2010....

Though ILS was urged to use the SSS as a sole income measure for determining assigned counsel eligibility, we chose instead to rely on the Federal Poverty Guidelines (FPG) since the SSS currently is not updated annually. However, to calculate a realistic income variable by which to gauge eligibility, we looked to the New York State SSS and compared it to the FPG scale. Doing so, we learned that, across the state, self-sufficiency hovered around a 250% multiple of the FPG.

15. Section IIB of the Criteria and Procedures provides that an applicant is presumptively eligible for assigned counsel if, at the time of his application, he is incarcerated, detained or confined to a mental health institution. Should this presumption of eligibility apply to an applicant where, at the time of screening, he is already detained, although it is likely that the detention will not be for a long period.

A presumption of eligibility is rebutted if there is compelling evidence that the applicant has the financial resources to pay for assigned counsel. If there is compelling reason to believe that the applicant will not continue to be detained, then this presumption is rebutted and the applicant's ability to pay for counsel should be considered.

16. Why do the Criteria and Procedures exclude, from consideration as an asset, monies received from child support?

Child support is for the support of the child, not for the support of the parent. Money intended for the child's well-being should not be used to pay the costs of a parent's

criminal defense.

17. There are times when defenders will be rushing to off-hour arraignments from places other than their offices. In those cases, they might not have an eligibility application on them, or, for some other reason, they might be unable to conduct the screening upon meeting the applicant. When that happens, a provisional appointment is made and the screening is done later. What, however, is the priority? Is it ensuring that someone has counsel immediately, right then and there, especially when the person is in front of a judge and his liberty is at stake, or, is it filling out the application form?

The priority is ensuring that a person has counsel. That is why the Criteria and Procedures state in Procedure XII that if there is reason for a delay in determining whether someone is eligible for assigned counsel, counsel should be appointed provisionally.

18. The Criteria and Procedures provide that an individual is presumed eligible if he has recently been deemed eligible in another criminal case in the same or another jurisdiction. Does that not, in effect, allow one jurisdiction to make an eligibility determination for another jurisdiction?

If every county applies the Eligibility Criteria and Procedures uniformly, then decisions across counties will be consistent, and an applicant deemed eligible in one county should, in most circumstances, be deemed eligible in another county. Of course, presumptions are rebuttable. For example, if the applicant was previously found eligible for assignment of counsel in a complicated violent felony case in another jurisdiction, and the case in the current jurisdiction involves a simple violation, the presumption may be rebutted and it would be appropriate to re-screen the applicant.

19. Do we simply accept the information on the application and not request documentation to verify it?

While Procedure XIll allows screeners to request documentation to verify the information on the application, verification is not required. Requiring verifying documentation in all cases is unnecessary and counter-productive because it delays the screening process and can be administratively costly. However, if there is missing information or a reason to believe the applicant is providing misinformation,

verifying documentation may be requested. If verifying documentation is requested, the request should be made in accordance with Procedure XIII.

20. If an applicant states that he just “bounces around” and has no income, can we require proof of how the applicant is supporting himself?

Such proof should be sought only when there is reason to believe the applicant is providing misinformation. It is not uncommon for people with little or no income to “bounce around” between homeless shelters, friends, or relatives, even while occasionally working temporary, low-paying jobs. Requiring a person in such circumstances to provide proof of how he is supporting himself is administratively burdensome and will needlessly delay assignment of counsel.

21. Now that there are eligibility Criteria and Procedures to guide courts, do providers need to be involved in the decision-making process at all?

While judges have the authority to determine if an applicant is entitled to assigned counsel, in many jurisdictions, judges delegate to providers the responsibility to screen and make recommendations regarding the eligibility of assigned counsel. This practice complies with Procedure X.

22. What is ILS doing to ensure that OCA judges and the Town and Village Court magistrates are trained in the Criteria and Procedures?

We are currently working with OCA to train judges and magistrates. OCA asked us to provide them with a menu of training options – from a webinar, to live presentations. Training the judges and magistrates will be an ongoing effort.

23. In order for counsel to be assigned, does there have to be court action? In other words, when, for instance, someone is subpoenaed for questioning in the offices of the District Attorney, and needs an attorney, does counsel have to be assigned by the court, or can the provider, on his own, deem the client eligible for assigned counsel services and represent him without an assignment order?

Procedure XII addresses this issue, stating that counsel should be assigned upon a request for counsel, even if no court action has yet been taken. If necessary, this assignment may be provisional until a court can make a final determination regarding the applicant’s financial eligibility for assignment of counsel. This

procedure is necessary to comply with national and state professional standards, including the American Bar Association's Ten Principles of a Public Defense Delivery System, Principle 3, and the New York State Bar Association's 2015 Revised Standards, Standard B-3. This practice has also been recognized by at least one court as critical in protecting the rights of accused persons. See People v. Rankin, 46 Misc.3d 791, 811 (Monroe Cty. Ct. 2014) ("This [C]ourt holds that the Public Defender, following a preliminary eligibility determination for a witness, suspect, or defendant must have unconstrained liberty to act swiftly in defense of his clients, no different than attorneys in the private sector").

24. Are the Administrative Judges in each judicial district outside NYC in possession of the Criteria and Procedures?

Yes. On April 7, 2016, Judge Michael Coccoma, the Deputy Chief Administrative Judge for Courts outside New York City, sent a copy of the Criteria and Procedures to each of the Administrative Judges in the eight (8) judicial districts outside New York City, and to other OCA personnel.

25. Can someone other than the applicant deliver the eligibility application?

Yes. Someone other than the applicant may deliver the application when the applicant herself cannot personally deliver it, as doing so may prevent an unavoidable delay in the eligibility determination process.

26. On June 16, 2016, the Advisory Committee on Judicial Ethics issued Opinion 16-68 addressing an inquiry as to whether judges may choose not to follow Procedure XI of the Criteria and Procedures. Procedure XI provides that judges should ensure the confidentiality of the assigned counsel application process by conducting the application process in a confidential setting and not in open court, and by sealing the application documents. What steps should providers or other screening entities take in light of this opinion?

ILS has prepared a Comment regarding Opinion 16-68, a copy of which can be accessed here (insert hyperlink to the "Comment" document here). ILS has also updated its Sample Notice of Applicant's Right to Seek Review in response to Opinion 16-68. This issue is discussed in greater depth during each eligibility training we conduct with providers. We urge that you read the Comment and Sample Notice

carefully, and contact us directly should you have any additional questions on this issue.

27. Is it advisable to include on the assigned counsel application a question regarding an applicant's national origin, alienage, citizenship or immigration status, and, if not, why not?

ILS recognizes the importance of discerning a client's immigration status at the point of initial contact with the applicant, and that this initial contact often occurs when a client is seeking assignment of counsel. But including the question about citizenship on the assigned counsel application could prove problematic unless steps are taken to ensure that the information solicited is not inadvertently disclosed to the court when seeking a determination of assignment of counsel. Information relating to an applicant's national origin (which can include reference to citizenship and/or immigration status) should not influence the determination of an applicant's eligibility for assignment of counsel. But requesting, recording and submitting this information to the court for judicial review, provides the appearance that national origin and, more specifically, an applicant's citizenship or lack thereof, is influential as to the right to assigned counsel. In addition, information regarding citizenship and/or immigration status may require attorney- client privileged protections that should not be freely disclosed unless it is within the client's best interest to do so and/or within the client's informed consent. Any disclosure of citizenship and/or immigration status to the court may result in unintended consequences (such as voluntary referral for civil immigration enforcement purposes), or may, at a minimum, undermine the public's trust in the integrity of the eligibility determination process.

To avoid the potential concerns described above, a provider may choose either to (a) limit the citizenship question only to any confidential intake forms that are completed and not included for submission to the court, or (b) include the question on the eligibility application, but redact the information prior to court disclosure since information regarding national origin, citizenship and/or immigration status is not relevant to the process of determining eligibility for assignment of counsel.

We prepared this response in consultation with Joanne Macri, ILS Director of Regional Initiatives, who has extensive experience in representing non-citizens charged with a criminal offense and has trained criminal defense attorneys across

New York State on the immigration consequences of a criminal conviction.

28. Is a person who has a pending bankruptcy case eligible for assigned counsel?

Almost certainly yes because, as explained further, a person who has a pending Chapter 7 or Chapter 13 bankruptcy case has no disposable income.

To qualify for a Chapter 7 bankruptcy discharge, debtors are found, after the balancing of their living expenses against their net income, to have little or no disposable income with which to pay their creditors. Concomitantly, their non-exempt assets of value, if any, have been liquidated to satisfy their creditors. Chapter 13 debtors, on the other hand, are found to have some disposable income, but all of which must be turned over to the Chapter 13 Trustee on a monthly basis for a period of 36-60 months to pay their creditors an amount equal to, or greater than, the value of their non-exempt assets. And, during the pendency of the bankruptcy, Chapter 13 debtors are without authority to dispose of their non-exempt property without prior court approval.

Therefore, individuals in a pending Chapter 7 or Chapter 13 bankruptcy proceeding will almost certainly be eligible for assignment of counsel because they have no disposable income or readily marketable property with which to retain private representation for their criminal case. And, requiring bankrupt individuals to liquidate their exempt property (often called the “necessities of modern life”) for the purpose of retaining counsel would be counterproductive to the “fresh start” objective of their bankruptcy filing.

29. I have read the Criteria and Procedures, and have a lot of questions. Where do I go to get my questions answered and get some help?

We are here to support you. Please send any eligibility questions to: Jessica Bogran, jessica.bogran@ils.ny.gov

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